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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BALLY TOTAL FITNESS OF
CALIFORNIA, INC.,

Petitioner,

v.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES,

Respondent;

PCAM, LLC,

Real Party in Interest.

B276736

(Super. Ct. No. BC493486)

ORIGINAL PROCEEDING in mandate. Maureen Duffy-Lewis and Gregory W. Alarcon, Judges. Petition granted.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod and Steven J. Renick for Petitioner.

No appearance for Respondent.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Alex D. Guerrero for Real Party in Interest.

INTRODUCTION

Petitioner Bally Total Fitness of California, Inc. (Bally), challenges a ruling denying its ex parte application to set its motions for a new trial and for judgment

notwithstanding the verdict (JNOV) on August 15, 2016, the last date the motions could be heard, and that they be heard by a different judge because the original trial judge (Judge Gregory W. Alarcon) is on vacation. We conclude the trial court erred and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Following a trial between Bally and PCAM, LLC, the jury returned a verdict in favor of PCAM, and judgment was entered on May 31, 2016. PCAM served a conformed copy of the judgment on Bally on June 15, 2016.

Bally then served a timely notice of intention to move for a new trial and its notice of motion for JNOV. Pursuant to the provisions of Code of Civil Procedure section 661,¹ which provides that the trial judge is supposed to set the date for the hearing on a motion for new trial, Bally did not request or obtain a hearing date for its motions. However, both notices noted that pursuant to sections 629 and 660, the power of the court to rule on the motions would expire on August 15, 2016, and accordingly requested that the hearing on these motions be set for a date between August 8, 2016, and August 11, 2016. Bally filed and served its points and authorities on the motions on July 11, 2016. PCAM later opposed the motions.

On August 3, 2016, counsel for Bally called the clerk of the superior court regarding the status of the setting of the hearing. The clerk informed counsel that they had not been informed of the filing of the motions and so had not done the workup to set a hearing date. She also advised counsel that she would do so and would get back to him.

When Bally's counsel had not heard back from the clerk by Friday, August 5, he called the clerk again. He called three times, including the end of the day, but was not able to talk to the clerk about the motions for new trial and JNOV. The clerk finally called counsel back on the afternoon of August 8, and advised counsel that Judge Alarcon was going on vacation beginning on August 9, and therefore the motions could not be set until August 29, once he returned. This was the first that counsel had heard Judge Alarcon would be on vacation or when that vacation would take place. Counsel told the clerk this was a date beyond the jurisdictional deadline and therefore he would be applying ex parte for an order obtaining a hearing date on the motions by August 15.

On Wednesday, August 10, Bally filed its ex parte application, and counsel for Bally and PCAM appeared at the hearing, with PCAM filing its opposition to the application. Counsel appeared in Judge Alarcon's courtroom. But Judge Maureen Duffy-Lewis, in the courtroom next door, decided the application by ordering that the motions for new trial and JNOV were to be set for hearing on September 7, 2016, after Judge Alarcon returned.

¹ Undesignated code provisions are to the Code of Civil Procedure.

Bally challenged the ruling by filing a timely petition for writ of mandate, prohibition, or other appropriate relief on August 11, 2016. This court issued an order indicating its intention to grant the petition and issue a peremptory writ of mandate in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232; *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1290.) The court allowed further briefing and now grants the petition.

DISCUSSION

The parties here agree that PCAM's mailing of the conformed copy of the judgment on June 15 constituted service of notice of entry of judgment for purposes of setting the deadline for Bally to file its notice of intention to move for new trial and JNOV, and setting the last day on which the court has the power to rule on the motions. (See *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1267-1268.) The last day on which the trial court can rule on the motions is August 15. (See §§ 629 & 660.)

Section 661 provides that "[u]pon the expiration of the time to file counter-affidavits the clerk forthwith shall call the motion to the attention of the judge who presided at the trial, or the judge acting in his place, as the case may be, and such judge thereupon shall designate the time for oral argument, if any, to be had on said motion."

Section 661 further provides that a "motion for a new trial shall be heard and determined by the judge who presided at the trial." However, "in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court."

Bally timely noticed its motions for new trial and JNOV. Bally did not itself request or obtain a hearing date for those motions because section 661 assigns the duty of setting such a hearing to the trial judge. When the trial court failed to meet that duty, Bally attempted to solve the problem by contacting the court clerk. When the clerk, on August 8, attempted to assign an untimely date for the hearing on the motions, Bally learned for the first time that Judge Alarcon would be on vacation and could no longer hear the motions within the deadline. Bally then filed its ex parte application, asking the

court to solve the scheduling problem that Bally had not created. The court erred by denying Bally's ex parte application and scheduling the hearing on the motions beyond the jurisdictional deadline.

PCAM argues it is too late to have another judge hear Bally's motion for new trial because, among other reasons, section 661 states that "[s]uch motion, if heard by a judge other than the trial judge shall be argued orally or shall be submitted without oral argument, as the judge may direct, not later than ten (10) days before the expiration of the time within which the court has power to pass on the same." However, this 10-day rule is not jurisdictional. (See *Pappadatos v. Superior Court* (1930) 209 Cal. 334, 335-336 [holding this provision of § 661 is directory only and the failure to comply with it does not deprive the court of the ability to rule on the motion for new trial]; *Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 545 [same].)

Furthermore, we reject PCAM's argument that it is now too late to obtain relief because Bally waited too long to contact the clerk regarding its motions. We do not believe the fault of the scheduling problem lies with Bally.

DISPOSITION

The petition is granted. The trial court is ordered, by 4:00 p.m. on August 12, 2016, to (1) vacate its order of August 10, 2016, denying Bally's ex parte application to set its motions for new trial and JNOV on August 15, 2016, by a judge other than Judge Alarcon, and instead (2) issue a new order granting the application and ordering that a judge decide Bally's motions on August 15, 2016 (whether it is Judge Alarcon, if he becomes available, or a different judge).

The parties shall bear their own costs.

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.